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No. 92-741

In The

Supreme Court of the United States

October Term, 1992

FEDERAL DEPOSIT INSURANCE CORPORATION,

Petitioner,

v.

JOHN H. MEYER, ET AL.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES AND REGULATIONS:

TABLE OF AUTHORITIES – Continued

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Counsel of Record on behalf of Respondent, John H. Meyer, ("Meyer") files this Opposition to Petitioner's ("FDIC's") Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory and constitutional provisions cited in the petition, there are two regulations

involved in the case: 12 C.F.R. § 569a.6(c) and 12 C.F.R. §§ 569a.8(a) and (b). These regulations, as in effect on April 13, 1982, are set forth in Appendix B, *infra.*, 33a and 34a.

STATEMENT OF THE CASE

The following additional facts are necessary to correct inaccuracies or omissions in the statement set forth in the petition:

1. The thrift institution of which Meyer was an officer (Fidelity Savings and Loan ("Fidelity")) experienced severe financial difficulties but never became insolvent prior to when it was placed under federal receivership. Supp. C.A. Rec. Exc. 89 [On March 31, 1982, 14 days prior to the federal receivership, Fidelity had a net worth of $19,600,000.00].

2. The authority relied upon by the Federal Savings and Loan Insurance Corporation ("FSLIC"), and its special representative, Robert Pattullo ("Pattullo"), to terminate Meyer's employment was that granted to FSLIC by 12 C.F.R. § 569a.6(c) (App., *infra.*, 33a), which permitted the receiver to "reject or repudiate any lease or contract which it considers burdensome . . . ". 12 C.F.R. § 563.39, in effect at the time of Meyer's termination did not, as stated in the petition, define "any employment contract for an 'excessive term' as a forbidden 'unsafe and unsound practice'" (Pet., p. 7). Rather, that regulation provided that "[t]he making of [] an employment contract would be an unsafe or unsound practice if such contract would lead to material financial loss or damage to the

insured institution or could materially interfere with the exercise by the members of its board of directors of their duty of discretion"; something that "may occur, depending on the circumstances of the case, where an employment contract provides for an excessive term, or does not contain an appropriate termination for cause provision". App., *infra.*, 23a-24a.

3. Neither before nor after Pattullo terminated Meyer was Meyer given the reasons for his termination, nor an opportunity to indicate why he should not be terminated, nor notification of any right to object to his termination, nor an opportunity to present evidence as to why the decision to terminate him should be changed. Supp. C.A. Rec. Exc. 90-91. Meyer was also denied the opportunity to appeal the decision or present evidence to challenge it in any subsequent proceeding. App., *infra.*, 3a.

4. After appointing FSLIC as receiver of Fidelity, the Federal Home Loan Bank Board ("FHLBB") created a new thrift institution, Fidelity Federal Savings and Loan of San Francisco. Most of the assets and liabilities of Fidelity were transferred to this new institution which was eventually sold to Citicorp Corporation. Supp. C.A. Rec. Exc. 90. The receiver did not transfer to Citicorp any liabilities of Fidelity as to Meyer, including any claim for wrongful termination to the extent such liabilities existed. *Id.* By virtue of the various transactions occurring after the seizure, FSLIC assumed and undertook to pay and discharge valid liabilities, if any, arising out of Meyer's employment with or termination from Fidelity. C.A. Supp. Rec. Exc. 91.

5. At no time did the receiver publish a notice as required by 12 C.F.R. § 569.a8 or otherwise establish a claims procedure to allow creditors to present claims to the receiver arising out of dealings with Fidelity or the seizure and receivership. C.A. Supp. Rec. Exc. 56-57.

SUMMARY OF ARGUMENT

The court of appeal's decision is not in conflict with other circuits, the decisions of this Court or with any Congressional scheme. This case involves the interplay between the Federal Tort Claims Act (FTCA) and the FSLIC's "sue and be sued" clause, both of which can operate as waivers of sovereign immunity for a federal agency. Meyer's claim is not "cognizable" under the FTCA since the FTCA applies only to wrongs which would result in liability to a private person under local law. Meyer's claim is implicitly excluded from this definition because it asserts a violation of the federal constitution, rather than local law, and a violation which would not create liability for a private individual. Thus there is no waiver of sovereign immunity for Meyer's claim in the FTCA, but at the same time the FTCA would not foreclose such a waiver if found elsewhere, ie, in the sue-and-be-sued clause relevant to FSLIC.

The sue-and-be-sued clause relevant to FSLIC does provide such a waiver as it should be interpreted broadly where, as here, such a broad interpretation: (1) would not be inconsistent with any statutory or constitutional scheme, (2) would not gravely interfere with any governmental function and (3) would not be inconsistent with a

plain Congressional purpose to use the sue-and-be-sued clause in a narrow sense.

There are no special factors counselling hesitation such as those identified in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971), and its progeny. The court of appeals decision only indirectly impacts on federal fiscal policy in the same way as any indemnified *Bivens* claim against an individual federal agent.

Meyer's due process rights were clearly violated when his property interest in continued employment was taken without even the most minimal elements of due process. While FSLIC had a broad mandate to manage thrift institutions in receivership, and this included the power to repudiate burdensome employment contracts, a requirement of due process was implied in the regulations implementing that mandate.

The court of appeals decision does not threaten a dramatic interference with the nation's efforts to deal with troubled financial institutions. Rather, the court of appeals correctly preserves a fundamental value of the American constitutional democracy; an individual's right to some due process prior to deprivation of property even in the face of urgent governmental action.

REASONS FOR DENYING THE PETITION

The issue of sovereign immunity is important to, and has received substantial attention by Congress and this Court. Despite a significant body of law, however, there are inevitably fact situations that have yet to be fully addressed. This case presents one such circumstance:

where a *Bivens* claim is made against a sue-and-be-sued federal agency. In resolving the issues presented the court of appeals carefully applied existing precedent. The result is a ruling which does not disturb any Congressional scheme or decision of this Court. There is no compelling reason for review by the Court.

This Court has made it clear that where Congressional legislation or Executive regulation authorize deprivation of liberty or property, they must ordinarily provide for at least a minimal level of due process. The urgency of the circumstances in which government action takes place goes to *what*, rather than *whether* process is due. It is undisputed that at least prior to the seizure of Fidelity Meyer had a protected property interest in continued employment and that he did not receive even the most minimal elements of due process; that is, notice and a hearing of some kind. Again on this point, the court of appeals applied established precedent of this Court and there are no special or important reasons for review.

1. The interplay between two Congressional waivers of sovereign immunity is the critical issue in the court of appeals opinion. First, Congress provided for a limited waiver of sovereign immunity in the FTCA, 28 U.S.C. §§ 1346(b),2671-80. (Relevant portions reprinted at Pet., p. 37a.) Second, Congress provided a more general waiver of sovereign immunity as to actions against the FSLIC; providing at 12 U.S.C. § 1725(c)(4) (Pet., pp. 38a-39a)[1] that FSLIC may "sue and be sued, complain and

[1] 12 U.S.C. § 1725(c)(4) was repealed in 1989 but it was in effect at all relevant times to this action.

defend, in any court of competent jurisdiction in the United States". The court of appeals was correct in ruling that since Meyer's claim was not "cognizable" under the FTCA, and because the sue-and-be-sued clause must be broadly construed as a general waiver of sovereign immunity, Meyer's claim against FSLIC is not barred. This ruling is consistent with *Bivens;* there are no special factors counselling hesitation that would dictate a different result. The potential fiscal impact on the United States is similar to the impact when a government agent is sued under *Bivens* and given indemnity by the government.

a. In its petition, FDIC relies on a circular argument: that the FTCA is the exclusive waiver of sovereign immunity as to torts and because Meyer's claim is a tort, the FTCA is the only avenue available for him to find a waiver. This ignores the evident difference between common law torts and constitutional torts. *See, e.g., United States v. Smith,* 499 U.S. ___, 113 L.Ed.2d 134, 144-145 (1991) and separate opinion by Justice Stevens at 113 L.Ed.2d 152-155, n.4 and n.5. The court of appeals points out that Congress has provided a more sound basis to interpret the interplay between the FTCA and the sue-and-be-sued clause. Sue-and-be-sued clauses are not to be construed as a waiver of sovereign immunity for those claims that are "cognizable" under 28 U.S.C. § 1346(b). And claims are "cognizable" under § 1346(b) if the conduct complained of would result in liability to a private person under local state law. Since the conduct complained of here – failure to provide due process with respect to a deprivation of property – would not result in liability to a private person under local law, it is not

cognizable under the FTCA and the general waiver of the sue-and-be-sued clause provides a basis for suit.

The two cases claimed by FDIC to conflict with the court of appeals are in fact distinguishable. *Peak v. SBA*, 660 F.2d 375 (8th Cir. 1981) does not deal with a *Bivens* claim, i.e., a claim which would not make a private individual liable under state law. *Ascot Dinner Theatre, Ltd v. SBA*, 887 F.2d 1024 (10th Cir. 1989) does not consider the question which is at the heart of the court of appeals ruling: whether a *Bivens* action would be cognizable under the FTCA. Likewise, the cases which FDIC claims are "in substantial tension" with this case, *Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 105 (2d Cir. 1981); *McCollum v. Bolger*, 794 F.2d 602 (11th Cir. 1986); and *Periera v. United States Postal Service*, 899 F.2d 861 (9th Cir.1990), modified, 942 F.2d 577 (1991) and 964 F.2d 873 (1992), were specifically distinguished by the court of appeals on the ground of differences in the statutes under which the Postal Service was created as compared to the statutes creating FSLIC. Further, while the court of appeals did not note it, in those cases there were other statutes or regulations providing relief whereas here there is no relief for Meyer other than through this lawsuit. As noted below, the existence, or lack, of alternative mechanisms for remediation of constitutional violations is a factor consistently relied upon by this Court in considering the appropriateness of *Bivens* relief.

b. FDIC urges a narrow construction of the sue-and-be-sued clause, but this Court has dictated a broad interpretation that finds such clauses to waive immunity unless (1) the suit in question is "not consistent with the

statutory or constitutional scheme", (2) "an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function", or (3) "for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense". *Federal Housing Administration v. Burr*, 309 U.S. 242, 245 (1940); *cited*, approvingly by, *Loeffler v. Frank*, 486 U.S. 549, 554-555 (1988); *see*, also, *Franchise Tax Board of California v. U.S.P.S.*, 467 U.S. 512, 514 (1984); *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538 (9th Cir. 1987); *Morrison-Knudson Co. Inc. v. CHG Intern., Inc.*, 811 F.2d 1209, 1223 (9th Cir. 1987). No showing can be made here that the sue-and-be-sued language in § 1725(c)(4) should be read narrowly.

FDIC argues that the Congressional scheme here involved is the FTCA and "that the FTCA provides the exclusive damage remedy for claims that a federal agency caused tortious injury". Pet., p. 10. However, as the court of appeals points out, by its defining language 28 U.S.C. § 1346(b) only includes as torts those wrongs which would subject a private citizen to liability under local law. App., *infra.*, 16a. *Bivens* actions are implicitly excluded from this definition because state law would not impose liability on private citizens for constitutional wrongs. App., *infra.*, 10a.

No grave interference with the performance of a governmental function would result from a rule that required FSLIC to afford constitutional protection when a property interest is taken. Indeed, as pointed out by the court of appeals, the constitution compels some due process and the question of interference with governmental functions ultimately turns on *what*, rather than *whether*

process is due. App., *infra.*, 27a. This is consistent with the Court's ruling on which Meyer's constitutional claim is based, *Board of Regents v. Roth*, 408 U.S. 564, 569, n. 7 (1972) [A person must be afforded an opportunity for some kind of hearing prior to a constitutional deprivation except in emergency situations, and even in emergency situations, the person is entitled to a post-deprivation hearing]. *See*, also, *Boddie v. Connecticut*, 401 U.S. 371, 378-79 (1971).

c. Contrary to FDIC's argument, the court of appeals opinion allowing a *Bivens* action against a sue-and-be-sued agency was not "misguided and unsettling". Pet., p. 18. In *Bivens*, the Court emphasized that damages are often the only remedy for constitutional violations. That is certainly true here. More importantly, FDIC misinterprets the holdings of the Court, in *Bivens* and its progeny, on the availability of a right of action, absent express statute, and the nature and effect of "special factors counselling hesitation".

The pivotal ruling in *Bivens* is that damages for constitutional violations can be permitted even though no statute provides for them. *Carlson v. Green*, 446 U.S. 14, 18 (1980); *Chappell v. Wallace*, 462 U.S. 296 (1983). Dictum in *Bivens* inferred that such a remedy might not be available under two circumstances: (1) where there are "special factors counselling hesitation in the absence of affirmative action by Congress", or (2) "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective". *Carlson*, 446 U.S. at 18-19, citing *Bivens*, 403 U.S. at 396; *see*, also, *United States v. Stanley*, 483 U.S. 669,

678 (1987); *Chappell*, *supra*, 462 U.S. at 298. Special factors counselling hesitation have included a comprehensive congressional scheme to regulate military life (*Chappell*, *supra;* and *Stanley*, *supra*), a comprehensive system regulating government employment (*Bush v. Lucas*, 462 U.S. 367 (1983)), and an administrative structure and procedures regulating social security that "are of a size and extent difficult to comprehend" (*Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988), citing, *Richardson v. Perales*, 402 U.S. 389, 399 (1971). In each of these cases adequate alternative remedies had been provided for persons claiming constitutional violations:

> In sum, the concept of "special factors counselling hesitation in the absence of affirmative action by Congress" has proved to include an appropriate judicial deference to indications that Congressional inaction has not been inadvertent. When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional *Bivens* remedies. *Schweiker*, 487 U.S. at 423.

No such mechanism for remediation of constitutional violations was provided in the statutory or regulatory scheme under which Fidelity was seized and Meyer terminated.

FDIC notes that in *Bivens* itself the dictum counselling hesitation also mentioned the possible impact of

recovery on "federal fiscal policy". This factor as a limiting matter is not persuasive where, as here, the *Bivens* remedy is asserted against an independent federal agency rather than the United States itself. *Bivens* remedies are allowed against federal agents, despite the fact that the agents are commonly provided indemnity for such claims by the government. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 641, n. 3 (1987); 28 C.F.R. § 50.15(c). While it is true that these indemnity rights are not absolute, nevertheless, a *Bivens* claim that is covered by indemnity thus indirectly impacts on "federal fiscal policy". The impact on federal fiscal policy of a *Bivens* action against a sue-and-be-sued agency is much the same; indirect and not absolute. Agencies such as FDIC have budgets and experience operating successes and failures that only indirectly impact on federal fiscal policy. The impact of *Bivens* liability on such an institution no more directly effects federal fiscal policy than myriad other judicial rulings that sue-and-be-sued agencies must face, and this impact no more directly effects fiscal policy than the indemnified *Bivens* recovery against an individual federal agent.

2. FDIC's assertion that when FSLIC was appointed as receiver "a sea change occurred in [Fidelity's] legal and contractual relationships" (Pet., p. 21) is superficially relied upon to prove too much. Clearly, FSLIC had broad powers to manage the affairs of the institution in receivership and this included the power to repudiate contracts. However, in repudiating contracts, where constitutional rights were implicated, FSLIC was required to act in a fashion consistent with constitutional protections, including Meyer's right to due process.

a. FDIC does not apparently dispute two important matters: (1) That at least prior to the seizure of Fidelity, Meyer had a protected property interest in continued employment under *Board of Regents v. Roth*, 408 U.S. 564 (1972), and relevant California law as described by the court of appeals (App., *infra*, 20a-27a); and (2) That Meyer never received even the most minimal level of due process prior to his termination. FDIC's argument, rather, is that with the seizure and federal receivership came a "sea change" that substantially altered or invalidated prior commercial relationships. Pet., p. 21.

Neither Meyer nor the court of appeals dispute that FSLIC had broad authority to manage the affairs of Fidelity after its seizure. This included the power to "reject or repudiate any lease or contract which it consider[ed] burdensome." 12 C.F.R. § 569a.6 (as in effect on April 13, 1982). App., *infra*, 33a. The regulation itself does not provide for due process. However, for more than seventy-five years, and as recently as 1991, this Court has consistently held that Congressional legislation and Executive directives that authorize deprivations of liberty or property must ordinarily provide for due process and where they are silent the right of impacted individuals to notice and a meaningful opportunity to be heard will be implied. *Burns v. United States*, 501 U.S. ___, 115 L.Ed.2d 123 (1991); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *The Japanese Immigrant Case*, 189 U.S. 86 (1903). As noted in *Burns*, the "Court has likewise inferred other statutory protections essential to assuring procedural fairness." *Id.*, citing, *Kent v. United States*, 383 U.S. 541, 557 (1966) [right to adversary representation in juvenile transfer proceedings]; *Greene v. McElroy*, 360 U.S. 474,

495-508 (1959) [right to confront adverse witnesses in security clearance revocation hearing]; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 48-51 (1950) [right to formal hearing in deportation proceedings]. Meyer does not claim that his employment could not have been terminated in the sound discretion of the FSLIC and its receiver. Meyer does claim, however, that he was entitled to due process; that is, to an opportunity to be heard and explain why he should not be terminated.

FDIC's assertion that Meyer's due process is limited to submission of a claim (Pet., pp. 23-25) is disingenuous to say the least as it is based upon a critical misstatement of fact. The claim procedure that might otherwise have given Meyer some right to relief was never instituted in the subject seizure.[2] As FDIC knows, this action is the only vehicle that Meyer has ever had to seek redress for the violation of his constitutional rights.

3. The court of appeals decision does not threaten a "dramatic interference with this nation's efforts to deal with failed financial institutions." Pet., p. 25. The importance of FDIC's (and, previously, FSLIC's) task is not disputed. But even critical tasks of the government are required to be completed in a manner that preserves constitutional protections. Requiring some level of due process prior to property deprivations is not unreasonable and is constitutionally compelled.

"At its core, the right to due process reflects a fundamental value in our American constitutional system". *Boddie v. Connecticut, supra*, 401 U.S. at 374. As acknowledged by the court of appeals, the federal receiver was operating in a difficult context. However, the urgency of the circumstances goes properly to *what* process was due rather than *whether* process is due. At a minimum, Meyer was entitled to " . . . *some* kind of notice and [to be] afforded *some* kind of hearing" – "rudimentary precautions" guaranteed by due process. *Goss v. Lopez*, 419 U.S. 565, 579-581 (1975) (Emphasis in original); *see*, also, *Board of Regents v. Roth, supra*, 408 U.S. at 570, n. 7 [before a

[2] The claim procedure contemplated in regulations at the time was found at 12 C.F.R. § 569a.8, (App., *infra*, 33a). It provided for a notice, the creation of forms for presenting claims, and various other procedures. However, with reference to the Fidelity receivership, the notice was never published, the forms were never prepared and an opportunity to present claims was never provided to Meyer or anyone else. This, despite the fact that by virtue of the various transactions occurring after the seizure, FSLIC assumed and undertook to pay and discharge valid liabilities, if any, arising out of Meyer's employment with or termination from Fidelity. Pet. p. 4; C.A. Supp. Rec. Exc. 91.

FSLIC also asserted to the district court that Meyer should have made a claim. However, because no evidence was presented to the district court that a claim procedure was ever instituted or made available to Meyer, the court ruled that FSLIC would be estopped from further making this claim in the action. C.A. Supp. Rec. Exc. 56-57.

Thus FLSIC/FDIC's assertions as to Meyer's supposed right to present a claim takes on an Alice-in-Wonderland aura. FSLIC contractually agreed to pay and discharge valid liabilities arising out of Meyer's termination, then failed to provide any forum for Meyer to submit a claim, and, finally, in the context of litigation, it is claimed that Meyer should have submitted a claim, but only through the nonexistent claims procedure.

The mythical opportunity to submit a claim has never existed.

person suffers a deprivation of a protected property interest he or she is entitled to some kind of a hearing unless there is an extraordinary emergency in which case the person is entitled to a post-deprivation hearing].

Meyer was never afforded *any* notice or hearing, before or after his protected interest in his employment was taken from him. He received no due process in violation of constitutional guarantees.

The court of appeals decision reflects our tradition of ensuring some level of due process in all governmental deprivations. FDIC has made no showing that this would gravely interfere with its admittedly important functions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GENNARO A. FILICE III
Counsel of Record For Respondent

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 89-16695, 90-15025

JOHN H. MEYER, PLAINTIFF/APPELLANT
CROSS-APPELLEE

v.

FIDELITY SAVINGS, ET AL., DEFENDANTS
AND
FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, DEFENDANT-APPELLEE/
CROSS-APPELLANT

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

[Filed Apr. 5, 1991]

BEFORE TANG, FARRIS AND D.W. NELSON, CIRCUIT JUDGES

OPINION

D.W. NELSON, Circuit Judge:

With the enactment of the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), §§ 2671-80, Congress partially punctured the immunity of the sovereign. At the same time, however, it limited the relief available against parties other that the government by making the United States the exclusive defendant in various situations. This case presents one of the numberless questions arising out of this interplay: Whether a suit predicated on the tortious deprivation of fifth amendment due process, and

therefore arguably beyond the reach of the FTCA, may nonetheless be brought against the FSLIC pursuant to a "sue-and-be-sued" clause. We hold that it may.

I.

In 1966, plaintiff John Meyer ("Meyer") joined Fidelity Savings & Loan ("Fidelity"), where he remained for the ensuing sixteen years. By 1982, at the time he was terminated, he had reached the position of executive vice-president. That same year, as a result of dubious loan policies, Fidelity began experiencing severe financial difficulties. They finally came to a head on April 13, 1983, when California's Savings and Loan Commissioner seized Fidelity's assets and appointed the Federal Savings & Loan Corporation ("FSLIC") as state receiver. Because the FSLIC was later appointed the sole federal receiver by the Federal Home Loan Bank Board pursuant to 12 U.S.C. § 1729(c)(2), federal receivership replaced state receivership by operation of law.[1] Also on April 13, Robert Pattullo ("Pattullo") was named as the FSLIC's special

[1] On April 13, 1983, the FSLIC as receiver and the newly created federally chartered Fidelity Savings & Loan ("Fidelity Federal") executed an "Acquisition Agreement," whereby they purchased virtually all of Fidelity's assets and assumed practically all of its liabilities. The following day, the FSLIC acquired all remaining assets and undertook to pay all remaining liabilities.

Subsequently, on September 28, 1982, the FSLIC in both its corporate and receivership capacities transferred the assets and liabilities of Fidelity Federal to Citicorp Bank, which in turn transferred the assets and liabilities to its wholly owned subsidiary, Citicorp Savings and Loan.

representative to handle Fidelity's receivership. He promptly proceeded to terminate four employees. Among them was Meyer.

No reason was given Meyer for his termination, nor was he provided an opportunity either to hear the reasons why he should, or put forth the reasons why he should not be terminated. In the same vein, he subsequently was denied the opportunity to appeal the decision or present evidence to challenge it.

Meyer's suit, filed against a number o, defendants, grows out of these events. As of the time of trial, the sole remaining claim alleged that the FSLIC's and Pattullo's actions had deprived plaintiff of a property interest without due process of law, in violation of the Fifth Amendment.[2] The FSLIC's argument that it was protected by the doctrine of sovereign immunity having been rejected by the United States magistrate presiding over the trial,[3] the trial proceeded before a jury.

On September 19, 1989, the jury reached its decision pursuant to a special verdict. It found that Meyer had "a legitimate claim of entitlement to employment or a reasonable expectation of continued employment arising out of an implied contract with Fidelity;" that Meyer was

[2] On January 23, 1985, the district court issued an order dismissing a number of Meyer's claims, including his claim under the Fifth Amendment. However, on December 5, 1986, the court having reconsidered *sua sponte* its previous order, reinstated plaintiff's claim for deprivation of property without due process of law against the FSLIC and Pattullo.

[3] The trial was held before a magistrate pursuant to a stipulation and order entered February 16, 1989.

"discharged . . . by the FSLIC and/or Robert L. Pattullo;" that the FSLIC and/or Pattullo "failed to provide John Meyer with a hearing, the reasons for his discharge, and an opportunity to contest the reasons for his discharge before his termination;" that Pattullo was "acting within the scope of his employment at the time he terminated plaintiff;" and that Meyer was "damaged as a result of the discharge." Upon instruction challenged by appellant, and after the court had rejected appellant's request that it allow expert testimony on the state of the law at the time of Meyer's termination, the jury also found Pattullo to be "immune from liability under the doctrine of qualified immunity."

The FSLIC timely appealed, arguing that Meyer's claims against the federal agency were barred by sovereign immunity. In the alternative, it disputes the conclusion that Meyer was deprived of a protected property interest. Meyer then filed a cross-appeal on the issue of Pattullo's qualified immunity.[4]

II.

The jurisdictional puzzle presented by this case consists of four principal pieces. First is the fundamental proposition that, "[a]bsent a waiver of sovereign immunity, the Federal Government is immune from suit." *Loeffler v. Frank*, 486 U.S. 549, 555 (1987); *see also United States v. Testa*, 424 U.S. 392, 400 (1976); *LaBarge v. County of*

[4] Although the Federal Deposit Insurance corporation ("FDIC") is the statutory successor to the FSLIC, *see* 12 U.S.C. § 1821 (a), this opinion refers to the FSLIC as it was the FSLIC's interest that was litigated throughout the suit.

Mariposa, 798 F.2d 364, 366 (9th Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987).

Second comes Congress' express provision that the FSLIC may "sue and be sued, complain and defend, in any court of competent jurisdiction in the United States" 12 U.S.C. § 1725(c)(4) (repealed 1989); *see also F.H.A. v. Burr*, 309 U.S. 242, 245 (1939) (stating that "such waivers by Congress of governmental immunity in case of such federal instrumentalities should be liberally construed"). We consistently have held that this "sue and be sued" language constitutes a general waiver of sovereign immunity. *Woodbridge Plaza v. Bank of Irvine*, 815 F.2d 538, 542-43 (9th Cir. 1987); *Morrison-Knudsen Co., Inc. v. Chg Intern., Inc.*, 811 F.2d 1209, 1223 (9th Cir.) ("Unless Congress clearly directs otherwise, such 'sue and be sued' language waives an agency's sovereign immunity"), *cert. dismissed*, 488 U.S. 935 (1987).

The third item is the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 (b), §§ 2671-2680. The FTCA waives the United States' sovereign immunity from tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674; *see also Bush v. Eagle-Picher Indus.*, 927 F.2d 445, 447 (9th Cir. 1991)[5]

[5] In addition, under the FTCA,

> [T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if

The fourth and final piece of the puzzle is the FTCA provision that states:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title.

28 U.S.C. § 2679. Construing these four pieces together, our task can be expressed in the following question: Is a claim alleging deprivation of property without due process of law "cognizable" under the FTCA?

If the answer to this question is yes, the sue-and-be-sued clause has no effect on this case, *see* 28 U.S.C. § 2679(a), and Meyer's suit must be dismissed. Where the FTCA governs, its remedy is exclusive and a government agency may not be sued in its own name. *See Loeffler*, 486 U.S. at 549. The issue, then, simply becomes whether the FTCA waives the United States' sovereign immunity for the particular tort at stake and whether the plaintiff has duly complied with the Act's requirements. Meyer's suit alleges a constitutional tort, which, by definition, is based on federal, not state, law. Because the FTCA restricts its waiver to injuries "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or

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> a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b).

omission occurred," 28 U.S.C. § 1346(b), his claim would be barred.[6]

On the other hand, if the tort is *not* "cognizable" under the FTCA, then § 2679(a) has no application in this case and Meyer's suit is authorized by the broad waiver of sovereign immunity embodied in the sue-and-be-sued provision. *See Woodbridge Plaza*, 815 F.2d at 542-43; *Morrison-Knudsen*, 811 F.2d at 1223.

In deciding whether a claim is or is not cognizable, courts appear to have established three broad categories. First, claims brought against sue-and-be-sued agencies that clearly fall under the FTCA's coverage–that is, for which the FTCA provides a cause of action–are cognizable under section 1346(b). As a consequence, the remedy provided by the FTCA is exclusive. That result derives directly from section 2679(a) and the Supreme Court's opinion in *Loeffler*, where it stated:

> Congress expressly limited the waivers of sovereign immunity that it had previously effected through "sue-and-be-sued" clauses and stated that, in the context of suits for which it provided a cause of action under the FTCA, "sue-and-be-sued" agencies would be subject to suit only to the same extent as agencies whose sovereign immunity from tort suits was being waived for the first time.

486 U.S. at 562.

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[6] If this case is governed by the FTCA, other obstacles stand in Meyer's way. For instance, he would have had to bring his action against the United States and meet the administrative exhaustion requirements.

Second, claims against sue-and-be-sued agencies that do not sound in tort, and therefore escape the FTCA's ambit, are unaffected by section 2679(a). That much is clear from *Loeffler*, in which the Supreme Court held that limitations on a sue-and-be-sued waiver of sovereign immunity must be "expressly" created by Congress. 486 U.S. at 561. The waiver of sovereign immunity, in sum, is left intact as to non-tort causes of action. *See also Woodbridge*, 815 F.2d at 543-44 (holding that where a claim is not "within the exclusive purview of the FTCA . . . the 'sue-and-be-sued' provision" remains available to waive the agency's sovereign immunity) (citing *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512 (1984)).

In the third hypothetical lies the real brain teaser. These are hybrid cases where the claim sounds in tort but is excluded from the FTCA's coverage. They fall into two subgroups: explicitly excluded claims, and implicitly excluded claims. The question in both instances is whether the fact that the FTCA does not provide a remedy means that the action is not cognizable under the Act.

For actions controlled by an *explicit* exclusion, the answer is clear. Claims labeled "exceptions" by 28 U.S.C. § 2680 are one such example.[7] Such claims, which would appear to be embraced by the FTCA's definition of torts for which the government has waived its immunity but

[7] Thus, the FTCA "shall not apply to . . . [a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter . . . [a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States . . . [a]ny claim arising in a foreign county. . . . " 28 U.S.C. § 2680(k).

which are specifically excepted pursuant to section 2680, are not actionable. They are, however, deemed "cognizable" under the FTCA. *Safeway Portland Employees Fed. Credit Union v. FDIC*, 506 F.2d 1213, 1215 (9th Cir. 1974). Therefore, pursuant to section 2679, a sue-and-be-sued clause would *not* waive an agency's immunity as to such actions.[8]

[8] We find support for this position in a recent Supreme Court decision. At issue in *United States v. Smith*, 111 S. Ct. 1180 (1991), was the interplay between the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Liability Reform Act) and the FTCA. Under section 5 of the Liability Reform Act, "[t]he remedy against the United States" pursuant to the FTCA "is exclusive of any other civil action or proceeding for money damages. . . . " 28 U.S.C. § 2679(b)(1). In a sense, section 2679(b)(1) is thus the counterpart, as applied to federal employees, of section 2679's exclusivity provision directed at "sue-and-be-sued" agencies.

The problem in *Smith* was that the FTCA did not provide a remedy against the government because the alleged injury had occurred abroad and section 2680(k) of the FTCA specifically precludes recovery in such instances. The question, therefore, was "whether, by designating the FTCA as the 'exclusive remedy,' § 5 precludes an alternative method of recovery against a government employee in cases where the FTCA itself does not provide a means of recovery." 111 S. Ct. at 1185.

Reversing our court's prior holding, the Supreme Court held that "§ 5 makes the FTCA the exclusive mode of recovery for the tort of a Government employee even when the FTCA itself precludes Government liability." *Id.* In reaching this decision, the Court relied on statutory language addressed to the federal employee prong of § 2679 that is absent from its federal agency equivalent. Indeed, section 2679 (d)(4) expressly provides that suit "shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and *shall be subject to the limitations and exceptions applicable to those actions.*" 28 U.S.C. § 2679(d)(4) (emphasis

The other, more difficult example, concerns claims that sound in tort but are *implicitly* excluded from the FTCA's waiver of sovereign immunity. This is the case with torts for which state law would not impose liability on private persons, such as constitutional torts. Because "the constitutional tort is a child of federal law, the United States is not liable for such torts under the Federal Tort Claims Act." Bell, *Proposed Amendment to the Federal Tort Claims Act*, 16 **Harv J. on Legis**. 1, 4 (1979); *see also Pereira v. U.S. Postal Service*, 899 F.2d 861, 864 (9th Cir. 1990); *Keene Corp. v. United States*, 700 F.2d 836, 845 n.13 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983); *Birnbaum v. United States*, 588 F.2d 319, 322 (2d Cir. 1978); Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 **Sup. Ct. Rev.** 281, 356. *See generally* Dolan, *Constitutional Torts and the Federal Tort Claims Act*, 14 **U. Richmond L. Rev.** 281 (1980). We conclude, for the reasons that follow, that constitutional torts, in addition to being implicitly excluded from the FTCA, are also not cognizable under that statute.

The Seventh Circuit's exchange on this issue is most illuminating. In *Baker v. F & F Investment Company*, 489 F.2d 829 (7th Cir. 1973), African-Americans brought a suit alleging violation of their Fifth and Thirteenth amendment rights by federal agencies, including the FSLIC. The defendants' argument that the FTCA applied and did not

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added); *see also* 111 S. Ct. at 1185. Still, we are persuaded by the reasoning of the Supreme Court and by the holdings of various sister courts that suits predicated on tortious acts specifically excluded from the ambit of the FTCA cannot be brought against a federal agency, the existence of a sue-and-be-sued provision notwithstanding.

grant a remedy to the plaintiffs was characterized as both "elaborate" and "inherently suspect" by the court. *Id.* at 834-35. The Seventh Circuit proceeded to hold that subject matter jurisdiction existed for two reasons. First, addressing the issue of what we have called implicitly excluded claims, the court held:

> Plaintiffs' claim against these defendants is based on federal law. The complaint does not allege, and the federal defendants do not concede, that the United States, if a private person, would be liable to plaintiffs in accordance with Illinois law. Since the complaint is based exclusively on federal law, the FTCA is inapplicable . . . [T]he attempt to vindicate a right dependent, as here, upon federal statutes is not within the ambit of the FTCA.

Id. at 835.

Second, the court defeated the defendants' argument that the suit, being in reality a suit for tortious interference with contractual rights, was explicitly barred by 28 U.S.C. § 2680(h).[9] The court simply replicated its prior reasoning, stating that if this were "really a suit for interference with contract rights, then the FTCA would 'not apply' and the sue and be sued clauses would not be limited by § 2679(a), and the pre-FTCA consent to sue would not be affected." *Id.* at 836.

Six years later, the Seventh Circuit reconsidered its *Baker* decision in *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir.), *cert. denied*, 444 U.S. 829 (1979). That

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[9] Section 2680(h) provides that the FTCA will not apply to "[a]ny claim arising out of . . . interference with contract rights."

case involved a suit filed against the FDIC for a tort explicitly excluded from the FTCA; it did not involve any implicit exclusions. Reviewing decisions of other courts, the Seventh Circuit found that the FTCA "withdrew the sue-and-be-sued waiver of sovereign immunity" for explicitly excluded torts. *Id.* at 369. As most courts had ruled, even though a claim is labeled an exception under the FTCA, it nonetheless is "cognizable" for purposes of § 1346(b). *Id.* at 370; *see Safeway Portland,* 506 F.2d at 1215; *Edelman v. FHA,* 382 F.2d 594, 596-97 (2d Cir. 1967). Therefore, it overruled *Baker* on this point.

However, *Citizens Bank* left undisturbed *Baker's* second prong, namely that "because the claim arose under federal law it was not within the ambit of the Act." 592 F.2d at 370. Indeed, it expressly distinguished the facts of the two cases, remarking that "the conduct alleged in *Baker* . . . was not the kind of conduct a private person (see § 1346(b)) would ever have an opportunity to engage in, which suggests that Congress did not intend the Federal Tort Claims Act to apply." *Id.* at 370 n.8. In sum, there is a difference, for purposes of "cognizability," between claims explicitly excepted by the FTCA and those implicitly excluded by virtue of the FTCA's own definition – that is, claims where no private person would be liable under the law of the state.[10] The former are "cognizable" under the FTCA, while the latter are not.

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[10] This distinction appears to have guided the district court in the instant case. Indeed, although the district court dismissed Meyer's state tort claims because they fell under two exceptions explicitly mentioned in section 2680 of the FTCA, he agreed to hear plaintiff's constitutional allegation.

Support for this view can be found by comparing *Safeway Portland* with *First Empire Bank v. FDIC,* 572 F.2d 1361 (9th Cir.), *cert. denied,* 439 U.S. 919 (1978). As mentioned above, in *Safeway Portland,* we found that torts explicitly excluded from the FTCA are "cognizable" under the statute. *Id.* at 1215 (quoting *Edelman,* 382 F.2d at 597). And yet, in *First Empire,* we held the FDIC liable on a claim based on federal law without even mentioning the immunity argument. As noted in *Federal Deposit,* short of surreptitiously overruling *Safeway Portland, First Empire* must stand for the position that "a tort claim arising under federal law is not subject to the Act." *Federal Deposit,* 592 F.2d at 372.

Language from a large number of courts corroborates this position. For example, in *Birnbaum,* plaintiffs brought suit alleging that the Central Intelligence Agency ("CIA") had unlawfully opened letters from the Soviet Union. Besides discussing a number of causes of action cognizable under state law, the court scrupulously examined the claim alleging a constitutional violation:

> The District Court also held that the violation of plaintiffs' federal constitutional rights is a separate ground for liability under state law. We do not believe that the Federal Tort Claims Act comprehends *federal constitutional* torts in its reference to the "law of the place" under § 1346(b). . . .
>
> Since Congress restricted the basis for liability under the Act to the 'law of the place,' we think that it would be a *tour de force* to consider direct violations of the federal constitution as "local law" torts.

588 F.2d at 327-28 (footnote omitted) (emphasis in original; *see also Keene,* 700 F.2d at 845 n.13 (remarking that "*Bivens*-type actions against the United States are . . . routinely dismissed for lack of subject-matter jurisdiction"). These cases fortify the view that constitutional torts are not cognizable under the FTCA.

The FSLIC asserts that *Pereira* and its forebears[11] stand for the proposition that the sue-and-be-sued language does not waive its immunity for constitutional torts. In *Pereira,* plaintiff brought a First Amendment suit against the United States Postal Service. 899 F.2d at 862. Holding that the Postal Service was immune from suit despite its sue-and-be-sued clause, we stated:

> The Federal Tort Claims Act . . . provides a waiver of sovereign immunity for tortious acts of an agency's employees only if such torts committed in the employ of a private person would have given rise to liability under state law. Therefore federal district courts have no jurisdiction over the United States where claims allege constitutional torts.
>
> The "sued and be sued" language of the Postal Service's charter should not be interpreted to enlarge the waiver of sovereign immunity specified by the FTCA. . . . [T]he Postal Service cannot be sued for constitutional torts . . .

Id. at 864.

[11] *McCollum v. Bolger,* 794 F.2d 602 (11th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987); *Insurance Co. of N. Am. v. United States Postal Serv.,* 675 F.2d 756 (5th Cir. 1982); *Contemporary Mission, Inc. v. United States Postal Serv.,* 648 F.2d 97 (2d Cir. 1981).

We find *Pereira* inapposite for purposes of the instant case.[12] *Pereira,* as well as the three cases to which it cites on this issue, involved a claim against the United States Postal Service ("USPS"). Like the FSLIC, the USPS is a sue-and-be-sued federal agency; unlike claims against the FSLIC, however, claims against the USPS are governed by 39 U.S.C. § 409(c).[13] Section 409(c) provides: "The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service." Its import is to make the FTCA the sole possible avenue of relief for *all* torts committed by the USPS, whether or not the FTCA actually provides a remedy. In other words, section 409(c) has effectively read out tort actions from the general waiver of sovereign immunity embodied in the Postal Service's sue-and-be-sued clause. *See Pereira,* 899 F.2d at 863 (noting that the USPS's sue-and-be-sued waiver of sovereign immunity "is limited with respect to tort claims" by virtue of 39 U.S.C. § 409(c)).

[12] We note that a district court has cited *Pereira* on facts strikingly parallel to our own. In *Rush v. FDIC,* 747 F.Supp. 575 (N.D.Cal. 1990), plaintiff brought a suit alleging in part that his termination by the FDIC constituted a deprivation of property without due process of law. *Id.* at 576. Dismissing this portion of the plaintiff's claim, the district court held *Pereira* to be dispositive. *Id.* at 579 (holding that "[s]ince plaintiff cannot allege a constitutional tort under the FTCA, the sovereign immunity of the United States and its agencies remains intact").

[13] Section 409(c) was expressly invoked by all four courts. *See Pereira,* 899 F.2d at 863; *McCollum,* 794 F.2d at 608; *Insurance Co. of N. Am.,* 675 F.2d at 758; *Contemporary Mission,* 648 F.2d at 104 n.9.

Because the FTCA does not provide a remedy for constitutional torts, the United States has not waived its immunity for such torts when committed by the Postal Service. In light of this limitation on the sue-and-be-sued clause, we could not have found that language to have authorized a suit against the Postal Service for constitutional torts. Congress has enacted no such restriction on the general waiver of the FSLIC's immunity. For that reason, *Pereira* does not control this case.[14]

[14] In fact, *Pereira* does not explicitly refer to section 2679 at all. It is also noteworthy that two of the cases cited by *Pereira* are simply inapposite. In *Insurance Co.*, the court affirmed the dismissal of plaintiff's claim that the Postal Service had negligently lost bags containing currency. 675 F.2d at 757. The court's holding thus stands for the unremarkable proposition that since plaintiff's claim was a strict common-law tort action, subject to the exceptions of the FTCA, and because section 2680(b) states that § 1346 does not apply to "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," the suit was barred, notwithstanding the sue-and-be-sued clause. *Id.* at 758. The court never mentioned the issue of constitutional torts, nor need it have.
As for the second case, *Contemporary Mission*, the relevant portion of the opinion is limited to a footnote in which it is stated:

> [T]he district court correctly determined that it lacked subject matter jurisdiction over the claims against the United States Postal Service that were based upon certain postal officials' alleged interference with plaintiff's constitutional rights. The waiver of sovereign immunity contained in 28 U.S.C. § 1346(b) (1976) is limited to suits predicated upon a tort cause of action cognizable under state law.

648 F.2d at 104 n.9. Bereft of any mention of the sue-and-be-sued clause, the statement simply echoes a familiar point, namely that constitutional torts are not embraced by the FTCA's waiver of sovereign immunity. *See supra* at 9.

Nor are we persuaded by the FSLIC's argument that its interpretation best matches congressional intent. First, it cites Congress' wish to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'non-suable' agencies." H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945). Because the latter cannot be sued directly for constitutional torts, it argues, nor can the former.

Despite its force, the logic is not failproof. The Supreme Court case interpreting Congress' statement made it clear that "in the context of suits *for which it provided a cause of action under the FTCA*, 'sue-and-be-sued' agencies would be subject to suit only to the same extent as agencies whose sovereign immunity from tort suits was being waived for the first time." *Loeffler*, 486 U.S. at 562 (emphasis added). Congress, in sum, begged the very question raised by this case, namely whether constitutional torts are torts for which Congress "provided a cause of action under the FTCA." Hence, Meyer's view is equally consistent with legislative intent, leaving suable and nonsuable agencies on equal terms whenever, and to the extent that, the FTCA applies.

The FSLIC's second, more powerful retort is to point to the 1988 Liability Reform Act amending the FTCA. As outlined earlier, *see supra* note 8, Section 2679 has two prongs: the first is addressed to sue-and-be-sued agencies, § 2679(a); the second to federal employees, § 2679(b). In relevant part, both purport to provide exclusive FTCA

remedies against the United States.[15] However, under the amendment, Congress specifically held that federal employees were *not* immunized by section 2679(b) for civil actions "brought for a violation of the Constitution of the United States." 28 U.S.C. § 2679(b)(2)(A). The absence of a comparable restriction under section 2679(a) lends credence to the view that the Act also precludes constitutional tort suits against sue-and-be-sued agencies.

However, we reject that argument. Besides the fact that interpreting the sounds of legislative silence remains an uncertain science, there is another way of reading Congress' action. As Justice Stevens points out in his *Smith* dissent, section 2679(b)(2)(A) is of questionable usefulness: "Congress did not need to add this amendment . . . because . . . constitutional torts are, for the most part, outside the realm of common-law torts," *Smith, supra*, 111 S. Ct. at 1193 (Stevens, J., dissenting), and therefore unaffected by the FTCA or its amendments. As a result, it is at least arguable that its inclusion was meant as a reminder, an added guarantee made necessary by the amendment's potential ambiguity on this point.[16]

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[15] Section 2679(a) grants immunity to sue-and-be-sued agencies for claims cognizable under the Act; under section 2679(b), "[t]he remedy against the United States provided by Sections 1346(b) and 2672 of this title . . . is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee. . . . "

[16] Legislative history is only faintly enlightening. In distinguishing between common law and constitutional torts, the House Committee Report simply explains:

> [T]he term "common law tort" embraces not only those state law causes of action predicated on the "common" or case law of the various states, but also

Moreover, other differences between Congress' treatment of actions against federal agencies and against federal employees should be noted. The provision addressing the former is remarkably succinct. As we have seen, it does not mention that constitutional tort suits might still be viable against sue-and-be-sued agencies, *compare* 28 U.S.C. § 2679(b)(2)(A); but, by the same token, neither does it mention the continued applicability of the FTCA's explicit limitations. *Compare* 28 U.S.C. § 2679(d)(4). It follows no more logically from the absence of the former that agencies are immune from constitutional tort claims than it does from the absence of the latter that they are *not* immune from tort suits expressly excepted under section 2680.

Accordingly, for the reasons set out above, we find that Meyer's action against the FSLIC alleging deprivation of property without due process of law is not barred by the doctrine of sovereign immunity. The district court's ruling on this matter is affirmed.[17]

> encompasses traditional tort causes of action codified in state statutes that permit recovery for acts of negligence. . . . It is well established that the FTCA applies to such codified torts. . . . *A constitutional tort action, on the other hand,* is a vehicle by which an individual may redress an alleged violation of one or more fundamental rights embraced in the Constitution.

H.R.Rep. No 100-700, p.6 (1988) (emphasis added).

[17] The district court's opinion is strengthened by a final observation. "Constitutional torts" is a convenient catch-phrase, but like all catch-phrases, neither particularly accurate, nor particularly helpful. Even if all torts–whether of constitutional or common law origin–were considered cognizable under the FTCA, there is a question whether all "constitutional torts" are properly understood as torts. As the Supreme Court has

III.

We next address Meyer's claim that he was unconstitutionally deprived of his property interest without

noted,

> In some cases, the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. . . . In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law of torts.

Carey v. Piphus, 435 U.S. 247, 258 (1978). In the latter situation, it would seem incongruous to bar an action against a sue-and-be-sued agency by invoking the FTCA when the underlying action was not a tort action at all.

Whether or not such be the case here is debatable. In *Owen v. City of Independence*, 445 U.S. 622 (1980), the Court first suggested that a constitutional claim arising out of a discharge without due process of law could be analogized to a common law action for breach of contract, *see id.* at 639 & n.19, only to proceed to describe it as a tort action a few pages later. *See id.* at 642.

What we do know, however, is that the closest common law analogy to Meyer's claim is breach of an implied covenant of good faith and fair dealing, *see infra*, and that under California law, it is established that "tort remedies are *not* available for breach of the implied covenant in an employment contract to employees who allege they have been discharged in violation of the covenant." *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 700, 254 Cal. Rptr. 211, 239-40 (1980). Rather, "contractual remedies should remain the sole available relief." *Id.* at 696; *see also Mundy v. Household Finance Corp.*, 885 F.2d 542, 544 (9th Cir. 1989); *Aalgaard v. Merchants Nat. Bank, Inc.*, 224 Cal. App. 3d 674, 678 n.1, 274 Cal. Rptr. 81, 82 n.1 (1990). *Compare, e.g., Love v. United States*, 915 F.2d 1242, 1247 & n.3, 1248 (9th Cir. 1989) (finding that, under Montana law, the "implied covenant of good faith and fair dealing" is "recognize[d] as a separate cause of action in tort") (citing *Nicholson v. United Pacific Ins. Co.*, 219 Mont. 32, 710 P.2d 1342, 1348 (1985)). That Meyer's claim does not sound

due process of law. We review this question de novo. *United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984).

In *Board of Regents v. Roth*, 408 U.S. 564, 576-77 (1972), and *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), the Supreme Court held that to have a property interest, an individual must possess an entitlement to the benefit. Entitlements are created not by the Constitution, but by "independent source[s] such as state law." 408 U.S. at 577. Relying on *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980), and *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981), the district court found that Meyer had stated a proper claim under state law for enjoyment of continued employment. *See also Foley*, 47 Cal.3d at 676-82, 254 Cal. Rptr. at 222-26.[18]

in tort under California law further discredits the invocation of the FTCA to bar his action.

[18] In *Cleary*, plaintiff had worked to the employer's satisfaction for 18 years. 111 Cal. App. 3d at 447, 168 Cal. Rptr. at 724. The court stated that termination "of employment without legal cause after such a period of time offends the implied in law covenant of good faith and fair dealing contained in all contracts, including employment contracts." 111 Cal. App. 3d at 455, 168 Cal Rptr. at 729. In *Pugh*, the court found that some employers' conduct could give "rise to an implied promise that it would not act arbitrarily" in its dealing with employees. 116 Cal. App. 3d at 329, 171 Cal. Rptr. at 927. In particular, the court looked at "the duration of [plaintiff's] employment, the commendations and promotions he received, the apparent lack of any direct criticism of his work, the assurances he was given, and the employer's acknowledged policies." *Id. See also Russell v. Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 492 n.10 (9th Cir. 1983), *rev'd on other grounds*, 473 U.S. 134 (1985).

In *Foley*, the California Supreme Court disapproved of *Cleary's* holding "to the extent that [it] permit[s] a cause of

The terms and conditions of Meyer's employment that support his claim include his sixteen years of service for Fidelity, his frequent promotions and commendations and Fidelity's general policy of termination only upon a showing of good cause.

The FSLIC urges that, notwithstanding Fidelity's conduct, a contract for indefinite employment barring good cause was in excess of governing federal regulations. 12 C.F.R. § 563.39, in effect at the time of appellee's termination, provided that:

> An insured institution shall not enter into an employment contract with any of its officers or other employees if such contract would constitute an unsafe or unsound practice . . . [T]he making of such an employment contract would be an unsafe or unsound practice if such contract could lead to material financial loss or damage to the insured institution or could materially interfere with the exercise by the members of its board of directors of their duty of discretion provided by law, charter, bylaw or regulation as to the employment of an officer or employee of the institution. This may occur, depending upon the circumstances of the case, where an employment contract provides for an excessive term, or does not contain an appropriate termination for cause provision.

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action seeking tort remedies for breach of the implied covenant." 47 Cal.3d at 700 n.42, 254 Cal. Rptr. at 240 n.42; *see also supra* at note 18. However, the type of remedy available has no bearing on the issue whether Meyer enjoyed a reasonable expectation of continued employment. *Foley* itself makes this pellucidly clear by relying extensively on *Pugh* and, specifically, on the factors the court deemed critical in that case to find an implied promise. 47 Cal.3d at 676-82, 254 Cal. Rptr. at 222-26.

Cf. United States v. Gaubert, 111 S. Ct. 1267, 1277 (1991) (describing the FSLIC's "broad statutory authority"). The FSLIC's argument is that by virtue of 12 C.F.R. § 563.39, Meyer never enjoyed a property interest in continued employment. Because a guarantee of continued employment would be inconsistent with section 563.39, it follows that it must be considered non-enforceable.

As support for its position, the FSLIC invokes *Inglis v. Feinerman*, 701 F.2d 97 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984), and *Bollow v. Federal Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982). In both cases, plaintiffs asserted that their employment contracts gave rise to property interests that were unconstitutionally terminated. *Inglis*, 701 F.2d at 99; *Bollow*, 650 F.2d at 1096. The court disagreed. In *Inglis*, the employer was a federal bank created under the Federal Home Loan Bank Act, 12 U.S.C. § 1421 *et. seq.*, 701 F.2d at 98; in *Bollow*, it was a federal reserve bank governed by the Federal Reserve Act of 1913, 12 U.S.C. § 341, Fifth. 650 F.2d at 1097. The two relevant statutes gave the employer the power "to dismiss at pleasure" officers and employees. *Inglis*, 701 F.2d at 98; *Bollow*, 650 F.2d at 1097. Despite allegations that the bank's overall conduct and communications amounted to a promise of continued employment, the court held such purported pledges to be void and nonenforceable in light of inconsistent and controlling federal statutes. 701 F.2d at 98; 650 F.2d at 1099-100. *See also Aalgaard*, 224 Cal. App. 3d 674, 274 Cal. Rptr. 81 (construing in similar fashion the National Banking Act, 12 U.S.C. § 24, Fifth).

Although the analogy is seductive, it ultimately must fail. To begin with, there is no equivalent "dismissal at

pleasure" language in the instant case. It is one thing to have a federal statute that grants banks the power to terminate employment contracts at will, quite another to forbid insured associations from entering into burdensome or unsafe contracts. Where the former clearly collides with a "for cause" provision, the latter, at most, qualifies it. As Meyer remarks, it is perfectly plausible that a contract contemplating dismissal only for good cause would not "constitute an unsafe or unsound practice" under 12 C.F.R. § 563.39.

More importantly, the cases cited by the FSLIC all involve federal banks created under federal statutes. Here, although governed in part by federal law, the employer was a state-chartered savings institution. Federal law, which somehow "preempted" state law claims, *see Inglis,* 701 F.2d at 98 (explaining that *Bollow* "construed [12 U.S.C. § 341 (Fifth)] as preempting employee claims of wrongful discharge based on state law"); *Aalgaard,* 224 Cal. App. 3d 674, 274 Cal. Rptr. at 92 (finding that 12 U.S.C. § 24, Fifth preempted California law), does not preempt Meyer's action – nor indeed does the FSLIC claim that it does. In short, the contract allegedly created between Fidelity and Meyer cannot be voided on this ground.

The FSLIC directs its second set of arguments to the particularities of receivership law. First, it points to the broad power granted by Congress to federal receivers, citing their responsibility "to proceed to liquidate its assets in an orderly manner, whichever shall appear to be to the best interests of the insured members of the association in default." 12 U.S.C. § 1729(b) (repealed 1989). To compel the FSLIC to conduct a hearing before exercising its authority would, it is argued, be inconsistent with congressional intent.

Second, the FSLIC contends that its actions also are expressly permitted under California law because it incorporates applicable federal law. Indeed, California Financial Code § 9103 (repealed 1983), provides that a state receiver, "shall have all the rights, privileges and powers conferred upon it by federal statutes now or hereafter enacted." *See Fidelity Savings & Loan Ass'n v. Federal Home Loan Bank Board,* 689 F.2d 803, 810 (9th Cir. 1982) (stating that under this provision, "California law thus incorporates all federal law concerning the powers of the FSLIC as receiver"), *cert. denied,* 461 U.S. 914 (1983).

Once again, the FSLIC's argument is appealing. Stated somewhat differently, the contention is that Meyer's purported entitlement to continued employment was, from its very inception, defined conditionally, limited by the prospect of Fidelity's placement in receivership. With the implicit promise came the implied caveat.

Ultimately, however, this reasoning also is flawed. The source of Meyer's property right was California common law, a history of satisfactory employment, and an understanding of fair dealing. The fact that federal and, arguably, state law conferred wide discretion to receivers to repudiate "burdensome" contracts does not, retrospectively, annul the state entitlement. In *FDIC v. Mallen,* 486 U.S. 230 (1988), for example, the president and director of a federally insured bank was indicted on a number of charges. *Id.* at 236. As a result, the FDIC suspended him pursuant to 12 U.S.C. § 1818(g)(1), which authorizes precisely such action. *Id.* at 237-8. Reading the case through

the FSLIC's eyes, one would be tempted to say that there had been no deprivation of a property interest, since the interest itself was contingent upon the plaintiff not being indicted – in other words, the president's entitlement to continued employment could not survive his indictment, for that would be inconsistent with the FDIC's right to dismiss under federal regulations.

The Court, however, saw it differently. Without hesitation, if found that the plaintiff's right to continue as president was "protected by the Fifth Amendment Due Process Clause," and that "the FDIC's order of suspension affected a deprivation of this property interest." *Id.* at 240.[19] That the suspension was foretold made it no less of a deprivation.[20]

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[19] In *Mallen*, of course the statute did in fact give the suspended officer the right to a post-suspension hearing. It should be noted, however, that the right was given only after an initial statute that permitted suspension without a hearing had been ruled unconstitutional. *Id.* at 234. The point, simply, is that the existence of a provision allowing for termination or suspension in the event some occurrence were to take place does not simultaneously redefine the property interest at stake. Indictment did not trigger an interruption of constitutional protection; neither should receivership.

[20] Likewise, in ruling that a state-created entitlement to education meant that students could not be suspended on grounds of misconduct without due process, the Court in *Goss v. Lopez*, 419 U.S. 565 (1975), was unmoved by the existence of a state law permitting such action. In particular, the Court rejected the dissent's reasoning, reminiscent of the FSLIC's in this case:

> The Ohio statute that creates the right to a "free" education also explicitly authorizes a principal to suspend a student for as much as 10 days. Thus the very

Undoubtedly, federal receivership law reflects the urgency of the situation facing savings and loan institutions. The right given receivers to dispose expeditiously of burdensome contracts is an outgrowth of this emergency; but the weight of the federal interest goes to the question of *what*, not *whether*, process is due. The facts alleged in this case suggest that the FSLIC arbitrarily terminated some employees while retaining others. Meyer, for his part, was never given an opportunity to hear or be heard, and it was never determined – at least not openly – that keeping *him* aboard would somehow destabilize the entire crew. At a minimum, Meyer "must be given *some* kind of notice and afforded *some* kind of hearing" – "rudimentary precautions" guaranteed by the due process clause. *Goss*, 419 U.S. at 579, 581 (emphasis in original). Accordingly, we affirm the district court on this point.

IV.

Meyer also brought a *Bivens* action against Pattullo stemming from the alleged violation of plaintiff's Fifth Amendment rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). While the FTCA presents no bar to Meyer's *Bivens* action, he faces a different kind of obstacle in his suit against Pattullo. An official in Pattullo's position is entitled to

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> legislation which "defines" the "dimension" of the student's entitlement, while providing a right to education generally, does not establish this right free of discipline imposed in accord with Ohio law.

419 U.S. at 586-87 (Powell, J., dissenting) (citation omitted).

qualified immunity when his "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Finkelstein v. Bergna*, 924 F.2d 1449, 1451 (9th Cir. 1991); *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). Thus, "[t]he relevant inquiry is whether a reasonable government official could have believed that his conduct was lawful, in light of clearly established law and the information he possessed." *Thorsted*, 858 F.2d at 573 (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)).

In this case, after having received instructions from the court that were challenged by the plaintiff, the jury returned a verdict in favor of Pattullo on the grounds of qualified immunity. The court's instructions were as follows:

> The law provides government officials, such as the defendant, Robert Pattullo, with a defense of alleged violation of federal constitution and statutory law which is known as qualified immunity. . . .
>
> The defendant, Robert Pattullo, is entitled to the defense and has asserted the defense of qualified immunity if he can establish by a preponderance of the evidence that a reasonable government official confronted with similar circumstances in this case could have been believed [sic] that his actions were lawful.
>
> In determining whether a defendant, such as Robert Pattullo, is entitled to the defense of qualified immunity, you must consider whether the defendant could have reasonably believed that his actions were lawful in light of the defendants' official duties, the character of his official position, the facts of which he was aware and the events which confronted him.
>
> The reasonableness of the defendant Pattullo's belief is determined by the reasonable person's standard. It is not what the defendant Pattullo subjectively believed, but whether his belief that his actions in terminating the plaintiff were reasonable when judged by professional standards.

We begin, uncharacteristically, with substantial agreement: neither party disputes that the jury was improperly instructed. In light of controlling precedent, a proper instruction should refer *both* to the factors enumerated in this case *and* to "clearly establish law." *See, e.g., Thorsted*, 858 F.2d at 573. The district court rejected plaintiff's and defendants' proposed instructions, both of which met this requirement; clearly, it was in error.[21] This, however, does not end the inquiry.

As we recently noted, the trial court has wide latitude in formulating instructions and will be reviewed for abuse of discretion only. *Benigni v. City of Hemet*, 897 F.2d 473, 479 (9th Cir. 1988); *Thorsted*, 858 F.2d at 573. The reviewing court must determine "whether, considering the charge as a whole, the court's instructions fairly and

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[21] Arguably, the district court's decision to submit the question of qualified immunity to the jury means that it "necessarily found that the legal rules were clearly established in this area." *Brady v. Gebble*, 859 F.2d 1543, 1556 (9th Cir. 1988). *cert. denied*, 489 U.S. 1100 (1989). The court's conviction is not the issue, however; rather, it is the propriety of its explanation of the law to the jurors.

adequately covered the issues presented, correctly stated the law, and were not misleading." *Thorsted*, 858 F.2d at 312. An error of instruction will not be reversed "if it is more probably than not harmless." *Benigni*, 879 F.2d at 479; *see also Kisor v. Johns-Mansville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986) ("We must consider whether the instruction . . . [is] to the prejudice of the objecting party").

We conclude that the error in this case was nonprejudicial based on our finding that, as a matter of law, " 'the facts alleged . . . [do not] support a claim of violation of clearly established law.' " *Vaughan v. Ricketts*, 859 F.2d 736, 739 (9th Cir. 1988) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1985)), *cert. denied*, 490 U.S. 1012 (1989). Although we believe Meyer's claim has merit, *see supra* Part III, "a reasonable officer . . . could have believed his actions toward [Meyer] were constitutional even if they were not." *Wood v. Ostrander*, 879 F.2d 583, 591 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 341 (1990).[22]

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[22] It will not suffice to say, as plaintiff does, that *Roth* and *Perry* had clearly established the applicable law some 19 years ago. The heart of the problem, no doubt, lies in the "level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639; *see also Schiegel v. Bebourt*, 841 F.2d 937, 944 (9th Cir. 1988). As the level narrows, so too diminishes the likelihood that the official will be vulnerable to suit. Predictably, Meyer chooses to define the legal rule in as broad a manner as possible, evoking the right not to "be deprived of a constitutionally protected property interest until and unless he is afforded a due process hearing." Conversely, and just as predictably, Pattullo focuses on the narrowest possible definition, describing "FSLIC's termination of employees of a failed financial institution pursuant to takeover or liquidation" and "federal receivership law."

Because we find that a federal employee could reasonably have believed in the lawfulness of the actions at issue, we need not decide between these conflicting definitions. Still, we are mindful of the Supreme Court's admonition that

> the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. . . . But if a test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*.

Anderson, 483 U.S. at 639.

Rules governing federally insured institutions and federal receivership make for treacherous law. Indeed, the district court went so far as to reverse itself, initially finding that Meyer did not have a legitimate expectation of continued employment. In order to be clearly established,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson, 483, U.S. at 640 (citation omitted); *see also F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1315 (9th Cir. 1989); *Brady*, 859 F.2d at 1556. In light of the complex nature of Meyer's entitlement, reflected in both the district court's and our own examination of the issue, we are unable to say that *Anderson*'s standard has been met. The issue of qualified immunity should not have been submitted to the jury because Pattullo violated no *clearly established*

law. See Schwartzman v. Valenzuela, 846 F.2d 1209, 1211 (9th Cir. 1988) (question of clearly established right is question of law). Thus, any error in the qualified immunity instruction was harmless.

V.

Finally, Meyer contends that the district court erred by excluding expert testimony regarding the state of the law. A court's decision to exclude evidence is reviewed for abuse of discretion. *Ignacio v. People of the Territory of Guam*, 413 F.2d 513, 520 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970).

On numerous past occasions, this court has "condemned the practice of attempting to introduce law as evidence." *United States v. Unruh*, 855 F.2d 1363, 1376 (9th Cir. 1987), *cert. denied*, 488 U.S. 974 (1988). Indeed, "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx & Co., Inc. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir.), *cert denied*, 434 U.S. 861 (1977). If judges are advised to reject expert testimony on legal matters, surely it cannot be reversible error when they do so.

Conclusion

There are, essentially, two threshold matters in this case: the first is the FSLIC's immunity, and the second, Pattullo's. For the foregoing reasons, the district court's disposition on both issues is hereby

AFFIRMED

APPENDIX B

REGULATIONS

12 C.F.R. 569a.6(c) [In Effect On April 13, 1982] provides:

(c) *Assets, claims and contracts*. The Receiver shall have power to:

(1) Sell for cash or on terms, exchange, or otherwise dispose of, in whole or in part, any or all of the assets and property of the institution, real, personal and mixed, tangible and intangible, of any nature, including any mortgage, deed of trust, chose in action, bond, note, contract, judgment, or decree, share or certificate of share of stock or debt, owing to such institution or the Receiver.

(2) Surrender, abandon, and release any choses in action, or other assets or property of any nature, whether the subject of pending litigation or not, and settle, compromise, modify, or release, for cash or other consideration, claims and demands in favor of the institution or the Receiver.

(3) Reject or repudiate any lease or contract which it considers burdensome . . .

* * *

12 C.F.R. § 569a.8(a) and (b) [In Effect April 13, 1982] provides:

(a) The Receiver shall promptly publish, in a newspaper printed in the English language and of general circulation in the city or county in which the principal office of such institution is located, a notice to all creditors of such institution to present their claims with proof thereof to such Receiver on forms prescribed by the

Receiver on or before a date specified in such notice. The date specified in such notice shall be at least 90 days after the date of the first publication of such notice (Sundays and holidays included). Such notice shall be similarly published on dates approximately 1 month and 2 months after the date of such first publication. The Receiver shall mail a similar notice to any creditor, shown to be such on the books of the institution, at the last address of such creditor as the same shall appear on such books.

(b) Any claim filed on or before the date fixed pursuant to paragraph (a) of this section and proved to the satisfaction of the Receiver shall be allowed by the Receiver. The Receiver may disallow in whole or in part or reject in whole or in part any creditor claim or claims of security, or priority not proved to its satisfaction, and notice of such disallowance or rejection together with the reason therefore shall be served by the Receiver upon the claimant by certified mail. The mailing of notice of such disallowance or rejection to the last known address of any claimant appearing on the books or the proof of claim shall be deemed sufficient for the purposes hereof.

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